W. P. CORP.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-648 Decided April 22, 1991

Appeal from that part of a decision of Administrative Law Judge David Torbett sustaining the issuance of Notice of Violation Nos. 80-1-43-35 and 85-13-299-1, as modified. Hearings Division Docket Nos. NX 7-75-R and NX 7-76-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

If a question arises concerning who is responsible for compliance at a surface coal mining operation, it is proper for the OSM inspector issuing a notice of violation to cite all parties who may be responsible. When a cited party challenges such a notice on the basis that it is not a responsible party, OSM bears the burden of going forward to establish a prima facie case that such party is responsible. The challenging party, however, bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violations.

APPEARANCES: Ronald L. King, Esq., Thomas L. Pruitt, Esq., Grundy, Virginia, for appellant; J. Nicklas Holt, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

W. P. Corporation (WP) has appealed from that part of an August 4, 1989, decision of Administrative Law Judge David Torbett sustaining the issuance of notices of violation (NOV) Nos. 80-1-43-35 and 85-13-299-1,
as modified.

On September 16, 1980, Office of Surface Mining Reclamation and Enforcement (OSM) Reclamation Specialist Brent Virts inspected the site of
a deep mine in Russell County, Virginia, and issued NOV No. 80-1-43-35 to JNO-DOW Coal Corporation (JNO-DOW) under the authority of section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. § 1271(a) (1988). The NOV charged JNO-DOW with four violations

of the interim program regulations. 1/ JNO-DOW sought administrative review of the notice, claiming that the operation disturbed 2 acres or less. 2/ In a decision dated May 13, 1981, in Hearings Division Docket No. CH-1-26-R, Administrative Law Judge Tom Allen upheld the issuance of the NOV, finding that 2.28 acres had been disturbed (Exh. RX-61). JNO-DOW did not appeal that decision.

On August 20, 1985, OSM inspector Virts returned to the site and conducted an inspection, and on September 3, 1985, he issued a Ten-Day Notice to the Commonwealth of Virginia (Tr. 151; Exh. RX-4). The Commonwealth, through its Division of Mined Land Reclamation, declined to take enforcement action, insisting that the site was less than 2 acres (Exh. RX-4).
On October 4, 1985, Virts issued NOV No. 80-13-299-1, citing three violations of the interim program regulations. 3/ The NOV was issued to John Tizen, Donald Crouse, and Harold Keene d/b/a JNO-DOW.

Thereafter, on December 15, 1986, OSM modified both NOV Nos. 80-1-43-35 and 85-13-299-1 to include WP, Richard E. Phillippi, Inc. (REP), and Gardner Coal Corporation (Gardner), as additional parties responsible for the operation. 4/ WP filed a separate application for review of each of the modified NOV's. 5/ At the hearing, counsel for WP indicated that the

1/ Those violations were: (1) failure to install adequate sedimentation ponds in violation of 30 CFR 717.17(a); (2) failure to display a mine identification sign in violation of 30 CFR 717.12(b); (3) failure to maintain the access and haul road in violation of 30 CFR 717.17(j)(3)(i); and (4) failure to remove topsoil as a separate operation from areas to be disturbed in violation of 30 CFR 717.20(a).
2/ Although sec. 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1982), originally exempted from coverage of SMCRA "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less," Congress amended SMCRA on May 7, 1987, P.L. 100-34, 101 Stat. 300, to eliminate that provision effective for any surface coal mining operations commencing on or after June 6, 1987, and any surface coal mining operations conducted on or after November 8, 1987. See 52 FR 21229 (June 4, 1987).
3/ Those violations were: (1) conducting coal mining operations without obtaining a valid permit from the state regulatory authority in violation of 30 CFR § 717.14(a); (2) failure to regrade surface work areas and areas involved in excavation to approximate original contour in violation of 30 CFR § 717.14(a); and (3) failure to establish vegetative cover on the disturbed area in violation of 30 CFR § 717.20(b).
4/ NOV No. 80-1-43-35 was so modified only as to violations 1 and 4 of the NOV. Violations 2 and 3 had previously been terminated.
5/ REP did not seek review of either modified NOV. Donald Crouse sought review of NOV No. 85-13-299-1, while Gardner filed an application for review of each modified NOV, as well as for two failure to abate cessation orders which OSM issued. Crouse withdrew his application for review on the record at the hearing. Gardner did not appeal Judge Torbett's decision sustaining the modified NOV's and the cessation orders. WP did not seek review of the cessation orders (Tr. 9).

sole issue for consideration was "who the responsible parties are" (Tr. 20). He asserted that WP was not a responsible party.

In his decision, Judge Torbett concluded in relevant part that OSM had made a prima facie case that WP was a "permittee" under the Act and was, therefore, responsible for compliance with the governing law. WP filed a timely appeal.

Certain facts are not in dispute. The site preparation or "face-up" and the stripping of approximately 500 tons of coal from a seam near the surface prior to conducting a deep mine operation at the site in question constituted a non-exempt "surface coal mining operation" which disturbed more than 2 acres. The dispute arises over whether WP was involved in that operation, and, therefore, a responsible party. WP claims that is was not; OSM agrees with Judge Torbett that WP was involved.

The relevant facts, derived from the testimony and exhibits presented at the hearing, are that Harold Keene acquired the surface and deep coal mining rights to a 200-acre tract of land in 1976, which included the site in question (Tr. 51). Harold Keene also owned the surface of the land embracing that site (Tr. 58). WP acquired the surface mining rights to the 200-acre tract from Keene in 1977 (Tr. 51; Exh. R-60). Gardner, formed in 1980, consisted of Harold Keene and his son, Harold Lynn Keene, who together owned 50 percent of the corporation stock, and shareholders of WP and other individuals, who owned the other 50 percent (Tr. 53, 74, 82, 133). Harold Keene transferred the surface of what was to become the JNO-DOW site to Gardner prior to the commencement of any activities at that site (Tr. 58). During the period 1977 through 1980, WP was strip mining coal at a site ("the head of Long Branch") in southwestern Virginia and at a site approximately one mile from the JNO-DOW site (Tr. 53-54). Harold Keene bought or handled the coal mined by WP until the formation of Gardner (Tr. 54). Gardner controlled two tipples and it purchased all of WP's coal production, as well as the production from other people; however, Gardner did not engage in coal mining (Tr. 55).

Harold Keene testified that at the time the face-up operation commenced, Dan Sullivan was supervising the site in question (Tr. 59; 65). Harold Keene's son, Harold Lynn Keene, also testified that Sullivan supervised the site (Tr. 89). Sullivan was the president of Gardner and general manager of WP at that time (Tr. 59-60, 128). Sullivan also was supervising WP's nearby strip mining operation (Tr. 60). Harold Keene assumed that Sullivan's supervision of the face-up operation was performed in his capacity as president of Gardner (Tr. 65). Harold Keene observed a dozer working at the site, but he did not know who was operating it. He did see Emmitt King, a man he knew to be employed by WP, operating a drill on the site during preparation work (Tr. 60). He also observed Larry Stinson, an employee of Gardner, moving a drott (backhoe) off the site (Tr. 63). Gardner, however, did not itself engage in the removal of coal, and it owned no equipment (Tr. 85, 99).

Harold Keene stated that JNO-DOW had no role in the preparation of the site in question (Tr. 78; see also Tr. 87). In response to a question

whether WP participated, "at least partially," in the strip mining of coal from the site, Harold Keene stated, "Well, WP's people was there. Dan [Sullivan] was WP. He was also with Gardner" (Tr. 79).

In response to a question whether it would be fair to say, regarding the arrangement between WP and Gardner, that WP "was the part of the operation that mined the coal or produced the coal and Gardner Coal Corporation was the part that marketed it, handled it and sold it," Harold Lynne Keene stated: "That would be fair" (Tr. 85). He also stated that at the time of the face-up operation, Sullivan was the president of Gardner and the that, although he did not know Sullivan's exact job title with WP, "he's the kind of guy that if you needed anything with W.P. you would ask Dan" (Tr. 90). Harold Lynn Keene recalled that a front-end loader and possibly a dozer
were brought to the site from WP's nearby strip mine operation (Tr. 97).
He observed one Delmer Vencill at the site in the summer of 1980, who, to the best of his knowledge, was employed by WP (Tr. 95-96). He was not aware of any written agreements governing the face-up and stripping operation on the site (Tr. 100).

When asked who was strip mining the coal at the site, Harold Lynn Keene responded:

> Well, I can say this, Dan [Sullivan] was overseeing the strip mining of the coal. The idea was to face it up and get someone to deep mine it.
>
> As to what capacity Dan was operating, he was not on the payroll of Gardner to the best of my knowledge. He was the president of Gardner. I assumed he was on W.P.'s payroll.

(Tr. 98).

Sullivan testified that he had worked from approximately early 1973
to 1977 for REP, a construction company primarily involved in road construction (Tr. 128, 141). He stated that after REP set up WP as a coal mining enterprise in 1974, his responsibilities evolved so that he was more involved with WP, and in 1977 he became the general manager of WP, holding that position until he became president of WP in December 1980 (Tr. 141-43). Sullivan testified that WP did no work at the site in question to prepare it for deep mining (Tr. 135). He stated that "Richard E. Phillipi, Incorporated was contracted to come in and face-up the coal at this mine site" (Tr. 136).

[1] It is established that, under the initial regulatory program,
one who conducts a surface coal mining operation regulated by a state under state law is a permittee, whether or not required to hold a permit under state law. Jewel Smokeless Coal Corp., 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982). A permittee is responsible for compliance with the performance standards applicable to the operation. If a question arises concerning who is responsible for compliance, it is proper for the inspector issuing the NOV to cite all parties who may be responsible. S & M Coal Co., 79 IBLA 350, 355, 91 I.D. 159, 162 (1984). When a cited party challenges such an

NOV on the basis that it is not a responsible party, OSM bears the burden of going forward to establish a prima facie case that such party is responsible. The challenging party, however, bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violations. See S & M Coal Co., supra; 43 CFR 4.1171.

In this case, OSM showed that WP was a participating party in the face-up coal extraction activities that preceded deep mining at the site. WP was a coal mining company. Its equipment was on-site, as well as its personnel, including its general manager, Dan Sullivan. OSM established a prima facie case that WP was responsible for the violations referenced in the modified NOVs.

The only evidence presented by WP was the testimony of Sullivan and three documentary exhibits. Although Sullivan testified that WP did no work at the site to prepare it for deep mining, that denial of involvement is undercut by the evidence presented by OSM. In addition, Sullivan claimed that his presence at the site was solely in his capacity as the president of Gardner; yet, the record evidence is unrebutted that Gardner was not a mining company, owned no mining equipment, and engaged in no actual mining activities. Although Judge Torbett made no express finding on the credibility of the witnesses, it is apparent that he discounted Sullivan's testimony as self-serving. 6/ We conclude that WP failed to provide any credible evidence to counter OSM's prima facie showing that WP was a party responsible for the violations referenced in the modified NOV's.

Counsel for OSM correctly points out that much of WP's argument on appeal is misdirected in that it attempts to show that WP and JNO-DOW are not connected in any way. Such a showing avails WP nothing in the present appeal because the enforcement actions in issue are based on WP's participation in the face-up operation. JNO-DOW was not involved in that operation. As the deep mining contractor, JNO-DOW did not come on the scene until after the face-up operation. Thus, the relationship between WP and JNO-DOW, if any, is irrelevant to resolution of the present appeal. 7/

6/ IBLA will ordinarily defer to the findings of fact made by an administrative law judge where such findings are based on credibility determinations. United States v. Melluzzo, 105 IBLA 252 (1988).

7/ In his decision, Judge Torbett cited the definition of "control" found at 30 CFR 700.11(b)(2)(iii) in support of his statement that Gardner and WP were both "in a position to control the site through their agent Dan Sullivan" (Decision at 10). On appeal, WP complains that the cited version of the regulation does not apply because it was not in effect at the time of the mining in 1980 and that it may not be applied retroactively. WP is correct that the language cited by Judge Torbett was not in effect in 1980; however, whether or not that regulation may be applied retroactively is of no consequence, because it has no direct applicability to the situation presented in this case. 30 CFR 700.11(b)(2) provides that "surface coal mining operations shall be deemed related if they occur within twelve months of each other, are physically related, and are under common ownership and

Finally, WP charges, without waiving its position that it is not a responsible party, that violation 2 of NOV No. 80-1-43-35 (failure to display a mine identification sign) should be vacated because it is "duplicative" of violation 1 of NOV No. 85-13-299-1 (mining without a valid permit) and it is, therefore, "superfluous" (Statement of Reasons at 25). Review of the record reveals that WP was never charged with violation 2 of NOV No. 80-1-43-35. See note 4, supra. The December 15, 1986, modification of NOV 80-1-43-35, which added WP and two other companies as responsible parties, incorporated only violations 1 and 4 of NOV No. 80-1-43-35. See Exh. RX-7. Thus, there is no need to consider this argument.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

fn. 7 (continued)
control." Subparagraph (iii) provides the definition of "control" for "purposes of this paragraph." Here, the issue is not whether two or more surface coal mining operations are related, the issue is whether a particular company is a party responsible for violations at a specific surface coal mining operation.